July 31, 2002

Mr. Corbin R. Davis
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Via email:
Hard copy to follow via United States Mail

RE: Proposed amendment of MCR 7.302; Supreme Court File Nos. 1999-50, 2000-27

Dear Mr. Davis:

Thank you for giving us the opportunity to comment on these proposed rule amendments. The Appellate Practice Section Council of the State Bar of Michigan has reviewed the proposed amendments to MCR 7.302. This comment reflects the unanimous vote of the council and is offered in accord with Article IX of the bylaws of the State Bar of Michigan. It expresses the views of the Appellate Practice Section Council only and not necessarily the views or policy of the State Bar of Michigan. We submit the following comments.

The change that concerns us most is the Court's proposal to eliminate the 56-day period for filing a delayed application for leave to appeal to the Supreme Court in favor of adopting a single 42-day time limit for most applications. After much discussion on our Section listserv and at our Council meeting, the Council offers its cautious support for the proposal. The council views the proposed 42-day deadline as a marked improvement on the current 21-day deadline for 'timely' applications. A 42-day deadline will give attorneys–particularly appellate attorneys who are first hired at the application stage–significantly more time to carefully consider the factual record and the law and to prepare a cogent application. But the Council has some concerns arising from the adverse consequences of a shortened "jurisdictional" limit, particularly in criminal cases when defendants do not promptly learn of the decisions in their appeals.

As a threshold matter, the Council notes that over the past 20 years, the time limit for delayed applications has already been shortened from 180 days, to 60 days, to the current 56 days. Council presumes that the Court proposes to shorten the period again to further the policy of finality, but notes that the 90-day period in the U.S. Supreme Court works well. In the federal system, finality interests are protected by the prompt issuance of the Court of Appeals' mandate. In Michigan, the initial 21-day period now serves a comparable purpose. And, as we understand it, at present, applications for leave to appeal are about evenly divided between timely and delayed.

At the 2001 Appellate Bench Bar Conference there was a general discussion in at least one breakout session suggesting that attorneys sometimes use rehearing motions at the Court of Appeals as a device to gain more time to prepare a leave application because the present Supreme Court 21-day timely application period is so short. But, if rehearing motions that are filed simply to "buy" more time are a problem, perhaps this Court should consider lengthening the time to file an application, rather than shortening it.

One of the problems that appellate practitioners have with Supreme Court applications is that if we are filing the application at or near the deadline, we must allow sufficient time to assure that the application reaches the Lansing clerk's office in a timely fashion from our offices that are scattered throughout the State. The Council recommends that the Court adopt a "mailbox" rule for filing applications for leave to appeal. The rule should be adopted with the same effective date as the proposed 42-day rule. The Council will draft language for a proposed rule and submit it to the Court.

The Council is particularly concerned about the proposal to eliminate all applications for leave to appeal that are submitted more than 42 days after the Court of Appeals' opinion. While the Council appreciates the need for finality in the appellate process, we are concerned that, particularly in criminal cases, a party occasionally does not find out that an opinion has been issued by the Court of Appeals, or that a motion for rehearing has been denied, even within the present 56-day time period. See e.g., *People v Dickerhoff*, 450 Mich 1000 (Levin J., dissenting); *Keen v Warden, Thumb Correctional Facility*, 444 Mich 870 (1993). Justice Levin, in a somewhat different context, wrote:

> Most out of time delayed applications are received within a few days or weeks of the 56-day deadline and almost all within a month or two thereafter. . . . Most of the delayed applications are in criminal cases from indigent defendants who are incarcerated, who generally assert that they were not timely advised by their lawyer of the decision of the Court of Appeals. . . .
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> [T]he Court, under the present practice, will not have the opportunity to grant leave to appeal because it will not know that the application has been received. The clerk will . . . have returned the papers, and the Court will be unable to consider the legitimacy of the excuse for delay and of the merits of the assignments of error. [*In the Matter of the Contempt of Eston*, 432 Mich 1227 (1989) (Levin, J., dissenting.)]

Therefore, the Council asks the court to consider adding a "safety valve" procedure to accommodate the rare situation where the appellant is actually able to document an "excusable delay." This could be a special motion, either in the Supreme Court or the Court of Appeals, limited to the single topic of the appellant's receipt of the adverse Court of Appeals decision. The Court could require a compelling showing of nonreceipt before any further papers were accepted.

Finally, we support including the additional sentence in MCR 7.205(F)(3) clarifying that the time limit for late appeals from orders terminating parental rights is 63 days, as provided by MCR 5.993(C)(1).

As always, we appreciate the opportunity to comment. If you have any questions concerning our position, please contact me.

Respectfully submitted,

Evelyn C. Tombers
Chair, Appellate Practice Section